Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-727

FINLEY, KUMBLE, WAGNER, HEINE, UNDERBERG & GRUTMAN, a Partnership (formerly known as Finley, Kumble, Underberg, Persky & Roth and Finley, Kumble, Heine, Underberg & Grutman),

Petitioner,

—against—

CHARLES GROSS, MABEL BLEICH, GROSS & CO., and JEANNE DONOGHUE,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION

PHILIP MANDEL
Attorney for Respondents
10 East 40th Street
New York, N. Y. 10016
(212) 679-3760

Of Counsel:

RALPH WIENSHIENK
BERNARD ROTHMAN
MARC OWEN MANDEL

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In the

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No. 77-727

Finley, Kumble, Wagner, Heine, Underberg & Grutman, a Partnership (formerly known as Finley, Kumble, Underberg, Persky & Roth and Finley, Kumble, Heine, Underberg & Grutman),

Petitioner,

—against—

Charles Gross, Mabel Bleich, Gross & Co., and Jeanne Donoghue,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION

Two petitions for certiorari have been filed in this case. The instant brief in opposition is written with respect to No. 77-727, filed by Finley, Kumble, Wagner, Heine, Underberg & Grutman (hereinafter Finley, Kumble), as petitioner, against four defendants, our clients, as respondents. We too have filed a petition for certiorari, No. 77-717, on behalf of one of these four clients, Charles Gross. It seems likely that the Court will consider these petitions together. To prevent confusion, we are avoiding the use of the terms "petitioner" and "respondent" wherever possible, and, instead, we refer to the parties by name.

It seems to us that Finley, Kumble's statement of the facts is inaccurate in overall aspect. The statement is de-

signed to give an impression that a simple federal churning claim was transformed by defendants into an enormous and complicated case, involving an enormous number of counterclaims, and involving large numbers of parties who were strangers to the simple federal churning claim.

> "It was the responsive pleadings which transmuted this simple federal case, involving four parties, into a cumbersome, protracted litigation of more than a dozen state claims involving two dozen non-diverse parties—most of whom had nothing to do with the original dispute." (Finley, Kumble, Petition, p. 7).

This picture is misleading. The "simple federal case" actually consisted of five causes of action stated in the complaint, three under federal law and two under state law. In the end, a total of 20 claims were pleaded by all parties, but eleven of these were pleaded by *plaintiff* and only nine by the defendants.

True, defendants asserted seven state counterclaims as ancillary to the complaint,[1] but it is rather naive to measure the complexity of the case by the number of claims asserted. Typically, many of the claims asserted by each party were merely variations of a theme, that is, restatement of substantially the same facts under different theories of law. Defendants' counterclaims follow this pattern. A reading of the District Court and Circuit Court opinions will quickly show[2] that the first seven counterclaims are all

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[1] Defendants' Ninth Counterclaim was based on federal law, namely, the anti-trust laws, and the Eighth Counterclaim was a parallel claim under state law.

[2] See portion of Circuit Court opinion at pp. 15a-16a.

based on the claim that the sale of the partnership assets and business, *including the sale of the churning claim to the plaintiff*, was ineffective because in violation of the New York Partnership Law, and in violation of fiduciary obligations. One reason why the number of ancillary counterclaims mounts up to seven is that there were three individual defendants and, in part, each had to assert his own claim based on the common set of facts. Thus, there is no validity to the idea that defendants inflated the case to abnormal proportions by asserting a tremendous number of counterclaims.

Finley, Kumble's statement of the facts also falls short of accuracy in describing the additional defendants on counterclaims as "strangers" to the case, "who had nothing to do with the original dispute." A reading of the opinions below shows that this contention is factually erroneous. Except for two individuals who were exculpated by the trial court, each of the new parties was found to have been a participant in a conspiracy to use the baseless churning claim to deprive defendants of their partnership rights and capital. Each of these new parties violated fiduciary obligations owed to the defendants in promulgating the baseless churning claim. Most of the additional parties were former partners of the defendants, who made a dishonest settlement with Buckley in order to create this churning claim, and then assigned the churning claim to a new corporation so it could bring suit as plaintiff. The assignment itself was made by these new parties without the proper authority required by Section 98 of the New York Partnership Law. The non-partner additional parties were employees and attorneys of the partnership, and also promoters of the new corporation, who participated in the conspiracy.

Finley, Kumble, itself was certainly no "stranger" to the churning claim. The idea to use this claim as a ploy in the conspiracy against defendants originated with a Finley, Kumble partner, Mr. Persky. Finley, Kumble, through Persky and others, then manipulated a bad faith settlement with Buckley so as to secure from him an assignment to the partnership of the baseless churning claim. Then Finley, Kumble issued a knowingly false opinion which enabled the churning claim, along with all the other assets of the Newburger, Loeb partnership, to be transferred from the partnership to the plaintiff corporation. Finally, Finley, Kumble were the lawyers who drafted the knowingly baseless complaint asserting the claim in the instant action.[3]

Under the circumstances, Finley, Kumble cannot fairly be described as a "stranger" to the churning claim. More accurately, Finley, Kumble should be described as father, mother, midwife, nurse and guardian of this illegitimate claim.

Finley, Kumble's statement of the facts is also misleading with regard to defendant Donoghue. Though Mrs. Donoghue was not named as a defendant in the complaint, she was a partner in defendant Gross & Co. The churning claim was used as an excuse not to pay her $75,000 admittedly owed as her partnership capital in Newburger, Loeb & Co. Accordingly, Mrs. Donoghue obtained leave of the Court to intervene, to participate in the defense against the churning claim, and to press her own claim for payment of her partnership interest. Judge Owen's decision permitting Mrs. Donoghue to intervene is pub-

[3] See summary of findings re Persky at 49a.

lished at 62 F.R.D. 397 (S.D.N.Y. 1974). To say that Mrs. Donoghue " . . . thrust herself into the action as a volunteer defendant" (Finley, Kumble Petition p. 9) does not quite give an accurate view of the record.

Finley, Kumble also falls short in its description of Mr. Gross's claim under the federal anti-trust laws. To say that this claim was "buried in the voluminous pleadings in this case" (Finley, Kumble Petition p. 10), is mere rhetoric. The claim was pleaded along with all the other claims and, indeed, a pendent claim under state law was also based on it. The claim was the subject of an unsuccessful motion to dismiss before Judge Ward in 1972, and was fully explored by discovery and fully tried. To say that the claim was dismissed with a word or two by the trial court is not to tell the whole story. The anti-trust claim was the subject of a very substantial cross-appeal, and the Court of Appeals opinion devoted four pages to it (52a-56a). Although the Court of Appeals upheld the dismissal of this claim by the trial court, it did so without prejudice to the reassertion of the related claim under state law in the state courts.

We must disagree with Finley, Kumble's statement that the counterclaims forced federal courts to decide novel questions of state law. Finley, Kumble phrases the state issues artfully to suggest novelty, but we do not think that the meaning of Section 98 of the Partnership Law presented a novel question. Nor do we think a novel question was presented by Finley, Kumble's argument that lawyers are immune from liability for participating with their clients in an illegal conspiracy. We think it very well settled that admission to the Bar does not constitute a

license to steal, or, as the Court of Appeals put it more politely:

> "... admission to the Bar does not create a license to act maliciously, fraudulently, or knowingly to tread upon the legal rights of others." (49a)

Thus, the actual facts are entirely inconsistent with every facet of Finley, Kumble's argument that the counterclaims transformed a "simple federal case" into an unwieldy monstrosity, casting a heavy burden on the federal judicial system. The decisions of the trial court and of the Court of Appeals are both inconsistent with Finley, Kumble's argument that counterclaims and additional parties were gratuitously injected into this case. The fact is that this case was complicated and delayed by Finley, Kumble and the other conspirators in order to carry out a threat made before the start of the litigation, that they would embroil the defendants in litigation for many years, and thus hold off payment of the sums owed to them (35a; 71a). The delaying tactics of the additional defendants on counterclaims were so extreme that at one point the District Court was forced to fine some of the additional defendants and their lawyers $750 for repeated failure to comply with orders directing answers to interrogatories.

We have gone to some length in criticizing Finley, Kumble's statement of the case because the relationship of the claims and counterclaims to one another is peculiarly central to issues involving ancillary and pendent jurisdiction. We respectfully suggest that a far better view of these relationships can be obtained from the decisions below than from the presentation in Finley, Kumble's petition. Further, we should point out that the allegations

made in our pleadings as to the connection between the complaint and counterclaims are not mere pleading allegations. All of these allegations were found to be true by the trial court, whose findings were upheld by the Court of Appeals. This is not a case where it can be argued that pleadings were engineered to give the color of a claim so as to provide a basis for jurisdiction. Finley, Kumble's reference to the "fertile mind of a pleader" (p. 20) has no application to this case.

It seems to us that the strategy underlying Finley, Kumble's presentation of the case is transparent. They have perceived this Court's deep concern that an undue expansion of federal jurisdiction will overburden the federal judicial system. They have sought to exploit this concern, as though prodding a raw nerve, by misdescribing this case as a bugbear of jurisdictional enlargement. In fact, this case represents the proper working of the doctrine of ancillary jurisdiction and rules of joinder to achieve their purpose of avoiding piecemeal litigation. The claims tried in this case certainly should have been tried together in the interest of justice between the parties and judicial economy.

ARGUMENT

Finley, Kumble's petition presents no legal issues that require determination by this Court.

A. *This case presents no novel or expanded interpretation of ancillary jurisdiction under Rule 13(a).*

Finley, Kumble's brief may create the impression that this Court has never decided the constitutionality of Rule 13(a). However, 51 years ago, in *Moore* v. *New York Cotton Exchange,* 270 U.S. 593 (1926), this Court decided that a Compulsory Counterclaim Rule was constitutional, and laid out a standard of application which has governed all the subsequent cases. True, *Moore* was decided before the enactment of Rule 13(a), but the decision in *Moore* was based on Equity Rule 30, which was identical with Rule 13(a) except for the addition of two words. Since the decision below falls well within the boundaries set by *Moore* for ancillary jurisdiction over counterclaims, no new or novel issue is now presented to this Court by this petition.

On page 15 of its petition, Finley, Kumble states that no court has ever previously held that a relationship of defenses to issues in the counterclaim satisfies the Compulsory Counterclaim Rule, except the Second Circuit decision in *Lesnick* v. *Public Industrial Corporation,* 144 F.2d 968 (2d Cir. 1944). That statement is flatly erroneous. Apparently, Finley, Kumble's research failed to turn up any of the following cases, each of which holds that a counterclaim is compulsory when issues which must be decided in connection with the defenses against the complaint also constitute a significant part of the counterclaims: *United Artists Corp.* v. *Masterpiece Productions,*

221 F.2d 213 (2d Cir. 1955); *TPO Incorporated* v. *Federal Deposit Insurance Corp.*, 487 F.2d 131 (3rd Cir. 1973); *The Kissell Company* v. *Farley*, 417 F.2d 1180 (7th Cir. 1969); *United States of America* v. *Haskins*, 505 F.2d 246 (9th Cir. 1974); *Sue & Sam Manufacturing Company* v. *B-L-S Construction Co.*, 538 F.2d 1048 (4th Cir. 1976).

Finley, Kumble's statement that *Lesnick* v. *Public Industrial Corporation*, 144 F.2d 968 (2d Cir. 1944), is the only prior case so holding, is particularly hard to understand in view of the fact that the same principle is set forth strongly and clearly in another Second Circuit decision which was fully argued in the briefs below, and which is cited at least seven times in the Circuit Court opinion herein: *United Artists Corporation* v. *Masterpiece Productions*, 221 F.2d 213 (2d Cir. 1955). See Circuit Court opinion below, pp. 27a-30a. The *United Artists* decision has twice been cited approvingly by this Court: *Baker* v. *Gold Seal Liquors*, 417 U.S. 467, 470 (1974) and *Moor* v. *County of Alameda*, 411 U.S. 693, 715 (1973). Circuit Courts have cited *United Artists* approvingly at least eleven times.

The entire purpose of the compulsory counterclaim doctrine is to avoid a multiplicity of litigation with regard to overlapping claims or issues. Inherently, material which is at the same time a basis for defense to the complaint and a portion of a counterclaim constitutes the strongest kind of "logical connection" or transactional overlap sought to be comprehended within the Rule. As we have shown, this conclusion has been voiced in many decisions. It has been denied in none.

Finley, Kumble's argument tries to sidestep the fact that the complaint itself had to allege that the new corporation *owned* the Buckley churning claims. This was an essential element of the complaint. No matter how grievously Buckley might have been churned in the period 1962-1966, a complaint based on this wrong could not be asserted by a corporation created in 1970 without some showing that it had acquired title to the claim. Paragraphs 4 and 5 of the complaint allege that Buckley assigned the churning claim to the Newburger Loeb Partnership, and that the Partnership assigned it to the corporation along with all the other partnership assets under the Transfer Agreement of February 11, 1971.

There was no way in which Gross, Bleich and Donoghue could have drafted an answer to the complaint without admitting or denying the validity of the two successive assignments alleged in Paragraphs 4 and 5. They believed that the Transfer Agreement of February 11, 1971, which included the assignment alleged in Paragraph 5 of the complaint, was invalid under § 98 of the Partnership Law, and invalid as well because brought about by fraudulent self-dealing. They had no choice but to raise these issues in the answer. The compulsory counterclaim rule consequently forced them to bring into this action all of their counterclaims based on these same facts and contentions.

Finley, Kumble seeks to avoid this organic connection between the complaint and the counterclaims by making an empty statement: that the corporation's allegation in the complaint that it owned the churning claim was merely a *"ritualistic one sentence allegation."* (Petition, p. 20, 2d footnote. Emphasis added). This astonishing argument

does not withstand one moment's contemplation. Plaintiff's allegation of title to the claim was vital. Without this allegation, as any legal neophyte would know, the complaint must be dismissed. By Finley, Kumble's logic, one could disregard as a mere "ritualistic one sentence allegation" the allegation of title in a trespass case, the allegation of marriage in a divorce case, or the allegation of residence in a federal case based on diversity of citizenship.

If the complaint had been tried alone, without the interposition of denials, defenses, or counterclaims relating to the validity of the assignments, a judgment in favor of plaintiff would have operated as *res judicata* against any subsequent actions by defendants based on such claims, for any judgment in favor of plaintiff would necessarily have involved a finding that the churning claim had lawfully been assigned to it under the Transfer Agreement.

The two District Court Judges and three Circuit Court Judges who considered the jurisdictional issues unanimously recognized that the Transfer Agreement was at the very heart of both the complaint and the counterclaims. Indeed, the opinions of the Trial Court and of the Circuit Court both stress that the churning claim was a ploy in the struggle over the Transfer Agreement, and that the issues raised in the counterclaims were inextricably intertwined with the churning claim (29a; 71a, 82a-83a).

The case squarely falls within the classic definition of compulsory counterclaim set forth fifty-one years ago in *Moore* v. *N.Y. Cotton Exchange*, 270 U.S. 593, 610:

> "'Transaction' is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connec-

> tion as upon their logical relationship. The refusal to furnish the quotations is one of the links in the chain which constitutes the transaction upon which appellant here bases its cause of action. It is an important part of the transaction constituting the subject-matter of the counterclaim. It is one circumstance without which neither party would have found it necessary to seek relief. *Essential facts alleged by appellant enter into and constitute in part the cause of action set forth in the counter-claim.* That they are not precisely identical, or that the counterclaim embraces additional allegations, as, for example, that appellant is unlawfully getting the quotations, does not matter. To hold otherwise would be to rob this branch of the rule [the compulsory counterclaim provision of Equity Rule 30] of all serviceable meaning, since the facts relied upon by the plaintiff rarely, if ever, are, in all particulars, the same as those constituting the defendant's counterclaim." (Emphasis added).

Thus, there is no substance to the argument made by Finley, Kumble that the decision below expands the scope of federal jurisdiction or goes beyond a host of prior decisions which have interpreted Rule 13(a) and its predecessor, Equity Rule 30.

The only jurisdictional error made by the Court of Appeals was its ruling (reversing the Trial Court) that jurisdiction did *not* exist over Mr. Gross's claim for conversion of his securities, pursuant to the same conspiracy under which the churning claim was created and under which all of the assets standing in the partnership name, including the churning claim, and including Mr. Gross's

securities, were unlawfully transferred to the corporate plaintiff. This matter is discussed in *our* petition for a Writ of Certiorari, No. 77-717.

B. *The right of the defendant to join additional parties as counterclaim defendants is well settled by rules and precedents approved by this Court.*

Finley, Kumble argues as though some novel question is presented by the fact that additional parties were brought into the case as defendants to the compulsory counterclaims. This argument overlooks the practical necessity and desirability of such joinder; overlooks long-standing joinder provisions embodied in Rules 19, 20 and 21 of the Federal Rules of Civil Procedure; and overlooks a long line of cases which approve the bringing in of new parties to defend against compulsory counterclaims. Finally, Finley, Kumble's presentation of this argument submerges the fact that as recently as 1973, this Court recognized these precedents approvingly in *Moor* v. *County of Alameda,* 411 U.S. 693.

Rule 13(h) provides that additional parties may be brought into the action to defend against counterclaims under the ordinary joinder rules set forth in Rules 19 and 20. Rule 13(h) reads as follows:

> "JOINDER OF ADDITIONAL PARTIES. Persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with the provisions of Rules 19 and 20."

Rule 19 provides that a new person shall be joined if ". . . complete relief cannot be accorded among those

already parties . . . ." Rule 19 is sometimes called the Compulsory Joinder Rule.

Rule 20 provides, in part, that all persons " . . . may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of, or arising out of, the same transaction, occurrence, or series of transactions or occurrences, and if any question of law or fact common to all defendants will arise in the action." Rule 20 is sometimes called the Permissive Joinder Rule.

For a long time it has been recognized as clear that these rules operate together to enable new parties to be brought in as additional defendants on counterclaims when it is alleged that they are liable under the counterclaims along with plaintiff. Under the circumstances provided by Rule 19, the new parties *must* be joined as additional counterclaim defendants if feasible.

Rule 20(b) and Rule 21 wisely give the courts discretion to order separate trials, or to grant severances, or to order that certain parties be dropped, when the interests of justice or judicial economy so indicate. We think it highly significant that Finley, Kumble never made any motion under these rules for a separate trial, or for the severance of the case against it, or that it be dropped as a party.

Finley, Kumble's petition admits (p. 32) that several lower federal courts, like the court below, have held that a district court's ancillary jurisdiction extends to additional third parties whose presence is required for the adjudication of a compulsory counterclaim. Finley, Kumble

argues that this Court has never approved such authorities although they were mentioned in *Moor* v. *County of Alameda, supra.* We believe that, read in context, this Court's decision in *Moor* indicates unqualified approval of these authorities. This Court referred to the rule as "well-established" in the following portion of its decision in *Moor,* appearing at 411 U.S. 693, 714-715:

> "Moreover, the exercise of federal jurisdiction over claims against parties as to whom there exists no independent basis for federal jurisdiction finds substantial analogues in the joinder of new parties under the well-established doctrine of ancillary jurisdiction in the context of compulsory counterclaims under Fed Rules Civ Proc 13(a) and 13(h)[31] and in the context of third-party claims under Fed Rule Civ Proc 14(a).[32] "

The footnote references made by this Court in the above-quoted portion of its opinion, cite the following cases: *H.L. Peterson Co.* v. *Applewhite,* 383 F.2d 430, 433-434 (5th Cir. 1967); *Albright* v. *Gates,* 362 F.2d 928 (9th Cir. 1966); *Union Paving Co.* v. *Downer Corp.,* 276 F.2d 468, 471 (9th Cir. 1960); *United Artists Corp.* v. *Masterpiece Productions, Inc.,* 221 F.2d 213, 216-217 (2nd Cir. 1955); *Markus* v. *Dillinger,* 191 F. Supp. 732, 735 (E.D. Pa. 1961); cf. *Dewey* v. *West Fairmont Gas Coal Co.,* 123 U.S. 329 (1887); *Moore* v. *New York Cotton Exchange,* 270 U.S. 593 (1926); *Pennsylvania R. Co.* v. *Erie Ave. Warehouse Co.,* 302 F.2d 843, 844 (3rd Cir. 1962); *Southern Milling Co.* v. *United States,* 270 F.2d 80, 84 (5th Cir. 1959); *Dery* v. *Wyer,* 265 F.2d 804 (2nd Cir. 1959); *Waylander-Peterson Co.* v. *Great Northern R. Co.,* 201 F.2d 408, 415 (8th Cir. 1953).

Nor is there any merit to Finley, Kumble's reliance upon *Aldinger* v. *Howard,* 427 U.S. 1 (1976). That case is sharply distinguished from the instant case by at least three vital factors: (1) The decision in *Aldinger* was narrowly based upon Congressional intent that the Civil Rights Act not be applied against county governments; (2) *Aldinger* also rested on the fact that the new defendant was a person against whom " . . . no independent basis of federal jurisdiction exists." 427 U.S. 1, 2-3. At least thirteen times in the *Aldinger* decision the Court stressed the fact that the new party to be brought into the case was a party against whom no federal claim whatsoever existed, and who could not be brought into the action in any way except as a "pendent party." This factor does not apply to the instant case, for here independent federal jurisdiction existed over each and every additional defendant on counterclaims by virtue of the Ninth Counterclaim, which charged a violation of the federal anti-trust laws; (3) The facts and reasoning of *Aldinger* applied to a pendent claim asserted by a plaintiff, and not to a counterclaim, as in the instant case. A major consideration underlying the *Aldinger* decision was to guard against the ability of *plaintiffs'* attorneys, by artful maneuvering, to extend non-federal claims in the federal courts. This consideration is not present with regard to *defendants.* It is never the defendant who selects the forum. Defendant is brought into the federal courts by his adversary, the plaintiff. The rules of the federal courts frequently *compel* him to assert his counterclaim in that very case and forum. The nature of the counterclaim, as the courts have recognized, may require that additional parties be brought in for complete and economical adjudication.

The instant case illustrates these abstractions clearly. Defendants did not select the federal forum. They were brought into it pursuant to a conspiracy to destroy their partnership rights and property by means of a baseless federal churning claim. The plaintiff was only one of the conspirators and only one of the persons against whom the defendants had their claims. Rule 13(a) forced defendants to assert their counterclaims against the plaintiff in the federal action, and it would not be sensible, under any jurisprudential theory, to assert the counterclaims against the plaintiff in one action and the same counterclaims against the other conspirators in a separate state court action. The Federal Rules of Civil Procedure probably required defendants to bring in the other conspirators under the Compulsory Joinder Doctrine. At least, defendants were permitted to bring in the additional defendants against counterclaims under the Permissive Joinder Rule. Defendants' anti-trust claim against all of these conspirators was based on a federal statute, so that these additional defendants on counterclaims would be present as parties in the federal case, in any event.

Under these circumstances, we submit, *Aldinger* has no application to the instant case.

CONCLUSION

For the above reasons, and the grounds set forth in the opinion below, it is respectfully submitted that Finley, Kumble's petition for a writ of certiorari should be denied.

Dated: December 16, 1977

Respectfully submitted,

PHILIP MANDEL
Attorney for Respondents
10 East 40th Street
New York, N. Y. 10016
(212) 679-3760

Of Counsel:

RALPH WIENSHIENK
BERNARD ROTHMAN
MARC OWEN MANDEL